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No. 66

In the Supreme Court of the United States

OCTOBER TERM, 1960

JULIUS SILVERMAN, MEYER SCHWARTZ, AND ROBERT L. MARTIN, PETITIONERS,

v.

UNITED STATES OF AMERICA

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (R. 261-271) is reported at 275 F. 2d 173. The opinion of the district court denying the motion to suppress (R. 20-24) is reported at 166 F. Supp. 838.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1960 (R. 272-273). A petition for rehearing *in banc* was denied on March 8, 1960 (R. 278).

The petition for a writ of certiorari was filed on April 6, 1960, and was granted on May 31, 1960 (R. 278). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Evidence of petitioners' operation of a gambling establishment was obtained in part by listening from an adjoining building with the aid of a battery-operated amplifier connected to a short, needle-like antenna inserted in a pre-existing crack under the baseboard, part way but not through the party wall. The questions are:

1. Whether the listening constituted a "search" of petitioners' "house" in violation of the Fourth Amendment.

2. Whether a conviction based in part on that evidence deprived petitioners of liberty without due process of law in violation of the Fifth Amendment.

3. Whether the overhearing of words spoken into a telephone constituted an interception of a telephone communication in violation of Section 605 of the Communications Act.

4. Whether the evidence was otherwise inadmissible.

CONSTITUTIONAL AMENDMENT AND STATUTE INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and par-

ticularly describing the place to be searched, and the persons or things to be seized.

Communications Act (Act of June 19, 1934, 48 Stat. 605, 47 U.S.C. 605):

> SEC. 605. No person * * * not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto * * *

STATEMENT

Petitioners were found guilty, after trial before a jury, under three counts charging gambling offenses under the District of Columbia Code. The court imposed upon each of the petitioners concurrent sentences of nine months' imprisonment and fines of $500 on

each of two of the counts, and of twenty months to five years on the remaining count (R. 30-34).

The sole issue presented here is the admissibility into evidence of conversations overheard by police officers with the aid of an electronic device.[1] Petitioners' pre-trial motion to suppress the evidence was denied (R. 20-24)[2] and the evidence was admitted at the trial over timely objections (R. 46-53). The rulings were affirmed on appeal, Judge Washington dissenting. The relevant facts may be summarized as follows:

The police, having reason to believe that premises at 408 21st Street, N.W., in the District of Columbia, were being used as a gambling establishment,[3] obtained from the owner of the adjoining row house at 410 21st Street, which was then unoccupied, permission to use the

[1] The conversations overheard with the device also formed part of the basis for a search warrant, and on that ground petitioners also sought to suppress the evidence obtained upon execution of the warrant. Since the microphoned conversations were themselves introduced into evidence at the trial, however, a decision that that evidence was illegally obtained would by itself require reversal of the convictions, and it is unnecessary to determine whether the search warrant would also fall. However, since the question would become important in a new trial, should this Court reverse the present convictions, we may note that petitioners are in error in asserting that it is "undisputed" that there was insufficient evidence to support the search warrant without the challenged conversations (Pet. Br. 13). To the contrary, it is our view that more than ample grounds for the warrant were established entirely apart from the evidence obtained with the listening device—*e.g.*, the advice of the informant, the installation of three separate telephone lines in a second-floor bedroom, and conversations overheard without use of the device (see *infra*).

[2] The motion was renewed and again denied after a superseding indictment had been returned (R. 9-19).

[3] They had been so told by an informant (R. 12). They also knew from telephone records that three telephones, on separate lines, had been installed on the second floor (R. 113).

premises as an observation post (R. 169-170): In late March or early April 1958, police detective Stone and Special Agent Bedingfield of the Internal Revenue Service entered the premises on two occasions to make preliminary tests of the feasibility of overhearing conversations emanating from No. 408 (R. 93).

The officers had an electronic amplifying device consisting of a small battery-operated amplifier and earphones, to which was attached an antenna referred to as a "needle" or "spike." It was not a true spike, as it could not be driven into a wall, due to the delicacy of the needle (R. 102-103, 161). The needle was 11¾ inches in length (R. 102). The police inspector in charge had not called for any search for heating ducts against which to place the device, and neither the detective nor the inspector had plans of the building (R. 140, 201-203). The officers searched along the second floor wall in No. 410, adjoining No. 408, for a crack into which the needle could be partially inserted, employing a trial-and-error probing under the baseboard with the wire of a straightened clothes-hanger (R. 115, 141-142). They did not remove or tamper with the baseboard (R. 116, 142) and they did not make a hole anywhere (R. 100).

The officers ultimately discovered a crevice extending part way into the party wall from a point between the floor and baseboard in the front room. This crevice was employed thereafter (R. 100, 115-117). The party wall was 13 to 14 inches thick[4] and the officers testified that they inserted the needle only about 5½ or 5⅞

[4] The dimensions of 13 to 14 inches included 8 inches of masonry wall, 1½ inches of plaster board, plaster, and furring on each side, and 1½ inches of molding on each side (R. 122-123).

inches, half of its length, at which point something solid blocked further insertion (R. 84, 100, 103-104, 122-123, 143, 148; cf. "Possibly" 6½ inches, R. 161).[5] Detective Stone considered the needle to be in contact with a good sounding board but could not tell what it was (R. 143, 157-158; see also R. 117). On one occasion during the preliminary tests, he was able to hear a conversation taking place on the first floor of No. 408 (R. 97-98, 105).

On April 22, 23, and 24, 1958, the special agents entered No. 410 and placed the needle of the amplifying device in the crevice previously discovered (R. 56-59, 61, 64, 67, 71-72, 83-84, 87-89). While one officer would listen by means of the device with earphones, the other would listen at the wall through which conversations were also audible at times. On occasion, an ordinary water glass would be placed against the wall (R. 72, 106-107, 124, 151-152). There were "a couple of places further back towards the middle of the wall

[5] Petitioners are in error in stating that government counsel "stipulated" that the needle was inserted "into the party wall six or seven inches" (Pet. Br. 6). The stipulation appears at R. 40, where counsel for petitioners asserted to the court that there was an insertion "between the premises" at the baseboard (R. 40). When the court asked government counsel whether the facts were admitted, the reply was, "Your Honor, the facts are these." Thereupon, in his restatement, government counsel characterized the antenna as having been "slipped" by the officers "under" the baseboard (R. 40). He stated no dimensions. At the close of the government's restatement, the court asked whether there was dispute as to the facts. Government counsel replied, "That is my version of the facts. I don't know whether Mr. Williams will agree with me." Mr. Williams replied, "I think there is no dispute, your Honor" (R. 40). Thereafter, in argument but in no sense in formal stipulation, government counsel made the loose reference seized upon by petitioners, referring to the insertion as 6 to 7 inches. At another point he said "about six inches" (R. 42).

up higher where one could place their ear to the wall and get fairly good reception" (R. 149). On April 29, 1958, Agent Jewell returned without the amplifying device and, by placing his ear against the wall, overheard petitioners Martin and Schwartz quoting odds (R. 68-69, 77-80). By these several techniques, the officers overheard petitioners engaging in numerous betting operations (R. 62-68, 74-75, 84-91, 120-125).

On the basis of their investigation—the conversations overheard, the surveillance of No. 408 from the outside, telephone company records, and knowledge of prior criminal records of some persons observed going into No. 408—the officers on April 30, 1958, obtained search and arrest warrants which were executed that afternoon (R. 69-70, 78, 126-127, 171-172). In the front bedroom of No. 408, the police officers found three telephones, constantly ringing with wagering inquiries; windows covered with black cloth; a rug against the wall between No. 408 and the row house further south, No. 406; a can and grate device for burning papers; and wagering paraphernalia including bet slips, collections slips, sporting event schedules, "line" (odds quotations) sheets (R. 128-139, 165-168, 175-183, 185-201), revealing acceptance of as much as $37,950 in wagers in a single day (R. 188).

SUMMARY OF ARGUMENT

I

Petitioners, asking the Court to overrule *Olmstead* v. *United States*, 277 U.S. 438, and *Goldman* v. *United States*, 316 U.S. 129, contend that the use of an electronic device to eavesdrop on private conversations is

per se an unreasonable search and seizure in violation of the Fourth Amendment. Whatever might be the result under other circumstances hypothesized by petitioners, on the facts of this case the use of the listening device was, we submit, neither unreasonable nor a search or seizure.

Although to a degree an invasion of privacy, eavesdropping without physical intrusion on the premises has always been considered a reasonable and permissible method of police investigation, and the use of an electronic device to aid the sense of hearing does not make the conduct essentially different. Here, moreover, the use of the device was both narrowly limited and justified by the prior knowledge of the police. Before employing the device, the police had good reason to believe that the premises were being used, not as a home, but as the office of an illegal gambling operation. The device was not used for a general surveillence of the private activities of the occupants, in the hope of finding them in some indiscretion, but for the limited and specific purpose of confirming the officers' reasonable belief that the premises were being used then and there to transact an illegal betting business. It was used intermittently, only for a few days, and only during "business" hours when the illegal activities were thought to be actually in progress. And since part of the conversations could in fact be overheard with the naked ear, the use of the device in fact resulted, not in the unveiling of otherwise secret conduct, but only in a relatively minor expansion of the scope of observation. In short, the device was used neither for a general fishing expedition nor to expose conduct otherwise immune

from police observation. It was used to expedite an orderly, well-justified, and careful investigation and violated neither tradition nor conscientious scruple.

It is established, in any event, that the overhearing, from outside the "house," of a conversation within is not a "search" of the "house" or "person" within the meaning of the Fourth Amendment. *Olmstead* v. *United States, supra; Goldman* v. *United States, supra; On Lee* v. *United States,* 343 U.S. 747. It was not against every invasion of privacy but only a particularly offensive form—physical intrusions into protected areas—that the Fourth Amendment was designed to protect. Nor is it accurate to say that the use of listening devices presents a problem that was not foreseen by the framers, for eavesdropping as a means of investigation could not have been unknown at the time the Amendment was adopted, and the improvement in the techniques of eavesdropping effected by the device used here does not make it something different in kind. If technological developments make protections beyond those provided by the Fourth Amendment appropriate, it is, we believe, for Congress, and not initially the courts, to provide them.

The established limitations on the scope of the Fourth Amendment cannot be avoided, as petitioners contend, by invoking instead the due process clause of the Fifth. The limited and special use made of the listening device here was, as we have seen, reasonable and inoffensive to civilized standards of proper police conduct. Nor is there any basis for excluding the evidence under the general supervisory powers of this Court, for those powers are exercised only to implement policies other-

wise established by law and there has been no congressional disapproval of the method of investigation used here.

II

To avoid the limitations of the *Goldman* case, petitioners claim that the evidence was in fact obtained by a trespass, contending that the party wall was owned in common and that the insertion of the needle of the amplifying device into the wall constituted a violation of their property rights whether or not it was inserted more than half-way (a question on which there were no explicit findings below). It seems clear, however, that in the District of Columbia party walls are owned in severalty with cross-easements of support, not in common, and that the only limitation on each party's use of his half of the wall is that he may not impair the structural support to which his neighbor is entitled. Moreover, even if the wall were owned in common, there would still be no trespass, for a tenant in common is not a trespasser on any part of the estate.

III

That some of the words overheard were spoken into a telephone plainly did not make the eavesdropping a violation of the Communications Act. What the officers "intercepted" were the sound waves emanating from the speaker, not the electrical impulses being transmitted over the telephone wires.

ARGUMENT

Petitioners' basic position is a broad one—that the use of electronic devices for the purpose of eavesdrop-

ping, no matter how used or where placed, is a violation of the right of privacy and an unreasonable search under the Fourth Amendment. They ask this Court expressly to overrule its prior holding to the contrary in *Goldman* v. *United States*, 316 U.S. 129. They seek to have evidence obtained by electronic hearing devices deemed excludable, either under the rule of suppression established for enforcement of the Fourth Amendment, as a requirement of due process under the Fifth Amendment, or in the exercise of the supervisory power of this Court to control the admission of evidence in federal courts. This part of their argument is based largely on a projection of theoretical situations, dependent on possible future developments in the field of electronics, and has virtually no relationship to the actual facts of this case. It is the government's position that what was done here, as to these petitioners, was reasonable police behavior which did not constitute an unwarranted intrusion on rights protected by the Fourth Amendment or a departure from civilized standards. There was thus no reason to exclude the evidence, either under the rule of exclusion or in the exercise of the supervisory power of this Court. In our view, if there is to be control of electronic devices used without physical invasion of premises, that control must come from Congress, and not initially from the courts.

More narrowly, petitioners argue that, in inserting a needle through a crack in the party wall, the officers committed a trespass, regardless of whether the needle penetrated more than half of the party wall, and that therefore the evidence was excludable. They also contend that overhearing one part of a telephone conversa-

tion, by the device used here, constituted an unlawful interception in violation of Section 605 of the Communications Act. We also show that neither of these more limited contentions has merit.

I

The Overhearing of Conversations Without any Physical Intrusion by the Police was a Reasonable Method of Investigation Which did not Violate the Constitutional Rights of Petitioners Under the Fourth Amendment or the Fifth Amendment.

A. *The conduct of the police was reasonable.*

Conversations deemed by the participants to be private are frequently overheard. No one who has been in a rooming house, a row house, a hotel, an apartment, or an office building, can be unaware of that fact. It has never been suggested that, if police, who are in a place where they have a right to be, take advantage of that well-known fact in detection of crime, their behavior is unreasonable or a violation of the right to privacy. Eavesdropping as such is not a violation of constitutional rights.

That is essentially this case. There is here present none of the elements ordinarily in question in search and seizure cases. The officers had a perfect right to be in No. 410. They made no entry whatsoever into petitioners' rooms. They did not bore a hole through the party wall or even into the wall, nor did they tamper with a baseboard or otherwise change the wall. It is undisputed that the short antenna of the amplifying device employed by the officers, a rod-like wire less than a foot in length and resembling a metal knitting needle, at no time penetrated into petitioners' room.

What the officers did was to take advantage of the position they could legitimately occupy in No. 410 to check by their sense of hearing the reliability of information they had received that petitioners were conducting an illegal gambling establishment in No. 408. They did this just as they endeavored by their sense of sight to observe petitioners' movements from a place outside the house. Petitioners do not suggest that, to the extent that the officers could hear by the naked ear, they did anything wrong.[6] Petitioners do not contend that, to the extent that the officers aided the naked ear by the use of a water tumbler held against the wall, they did anything wrong. Petitioners' basic position is that, because the sense of hearing was aided by an electronic device rather than a mechanical one, the police action became transformed into wholly unreasonable conduct.

This record affords no basis for that position. There is no warrant in this record for the assertion by petitioners as an uncontradicted fact that the use of the microphone in this case transformed a heating duct into a giant microphone. It is not at all clear that the microphone needle hit a heating duct, despite the testimony of petitioners' witnesses, based on observations made largely in March 1959, eleven months after the event (during half of which time petitioner Martin

[6] The testimony of the officers to the effect that they could at times hear by the naked ear was in no way contradicted. Even petitioners' witnesses did not serve to contradict that fact. Their testimony was that the lowest decibel count they heard through the wall was eighty-seven and that sixty-five is normal conversation (R. 225). Not all telephone conversations are conducted in normal or reserved tones.

was in possession of No. 408), which attempted to suggest that such was the fact. It is unnecessary at this point to try to determine what it was that blocked the antenna—a matter as to which no finding was made by the district court.[7] The record makes it quite clear that, whatever the antenna hit, it did not have the broadcasting effect that petitioners attempt to impute to it. Detective Stone, who testified that he considered that the microphone was making contact with a good sounding board (R. 158), by his testimony also showed that the amplification did not have the gigantic character that petitioners suggest. Quite spontaneously, in answer to a question on cross-examination as to his listening in on the microphone on April 23, Stone said (R. 151):

> * * * But as to that, Agent Jewell seemed to have a little better ears and he was a little better at using it and catching that conversation on the microphone.
>
> And as a result, he did use the microphone a little more than Agent Bedingfield or myself.

Stone testified that it "wasn't always easy" to hear the conversations on the microphone (R. 151).

Moreover, there was no general amplification. The hearing device was taken into an empty house each day that the officers went there and was taken away

[7] Clearly, the officers were not looking for a duct—they obtained no blueprints until after the arrests, and they had not discussed such a placement. They sought any crevice where they could place the needle, and they did so by a pure trial-and-error probing by means of a coat-hanger (*supra*, p. 5).

each time they left (R. 152). Only one officer at a time used the device, employing ear phones for that purpose. It was employed only after the officers had reason to believe, from advice by an informant and from telephone records that three lines had been installed (R. 113), that the premises were being used, not as a home, but as the office of an illegal gambling operation.

The use of the device here was, therefore, not essentially different in character from the use of a water tumbler on the wall as an aid to hearing. There is thus no reason why its use should have legal implications different from those which would attach to the use of a water tumbler. So long as the agents were where they had a right to be, so long as there was no physical intrusion into petitioners' premises, there was no violation of petitioners' rights. The overhearing of conversations by the police in the setting of the instant case, as part of an orderly, well-justified, and careful investigation, violates no tradition or conscientious scruple.

B. *The overhearing of petitioners' words from outside was neither a "search" nor "seizure" of petitioners' "persons", "houses", or "effects".*

The Fourth Amendment guarantees the right of the people to be secure "in" their "houses" against unreasonable "searches and seizures" (*supra*, p. 2).

In *Olmstead* v. *United States*, 277 U.S. 438, this Court held that the overhearing, at a point outside the "house", of a conversation within, by means of a mechanical contrivance, is not violative of rights under the Fourth Amendment, there being no searching of

an individual's "house", "person", "papers", or "effects". In *Olmstead*, the conversation was overheard by wire-tapping, at a time prior to the enactment of federal legislation on the subject. There, as here, an effort was made to stretch the concept of the language, "search" of a "house", by urging that in listening on phone wires outside the house the listeners would somehow "project themselves" into the house (277 U.S. at 444). This Court, after extensive review of numerous decisions which it distinguished as instances of outright compulsion to produce documents (*Boyd* v. *United States*, 116 U.S. 616), of true physical entries into the "house", or outright seizures (outside the house) of actual physical "papers or effects", concluded as to the argued projection into the house (277 U.S. at 464):

> There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.

The Court stated that there was no justification for enlargement of the words "search and seizure" so "as to forbid hearing or sight" (277 U.S. at 465). And further (277 U.S. at 466):

> Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house "or curtilage" for the purpose of making a seizure.

That ruling has been consistently approved by this Court. *Goldstein* v. *United States*, 316 U.S. 114, 120; *Goldman* v. *United States*, 316 U.S. 129, 135; *On Lee* v. *United States*, 343 U.S. 747, 766; see also *United States* v. *Dennis*, 183 F. 2d 201, 225 (C.A. 2), affirmed, 341 U.S. 494. *Olmstead* has never been overruled.

In *Goldman* v. *United States, supra*, 316 U.S. 129, law officers placed a detectaphone against a wall to listen to conversations in an adjoining office. There, as here, in an effort to distinguish *Olmstead* v. *United States, supra*, the defendants argued to this Court that the employment of the device violated the Fourth Amendment because persons talking in the office did not assume the risk of the use of a delicate detector (316 U.S. at 135). The Court rejected the attempted distinction and refused to overrule *Olmstead*.

Petitioners' argument that it should make no difference whether police are listening with a device concealed inside or outside the premises (Pet. Br. 21) ignores the purpose of the Fourth Amendment to protest against physical intrusions into protected areas. Where a trespass has been committed in order to plant a transmitting device, a camera, or a person, "it might, with reason, be claimed" that there is a continuing trespass (*Goldman* v. *United States*, 316 U.S. 129, 134-135) and therefore a violation of the rights which the Fourth Amendment was designed to protect. This is the reason for the stress in the *Goldman* case upon the fact that a prior trespass bore no significant relation to the later placing and use of the detectaphone. This is not a purely technical distinction. Eavesdropping on a conversation from a place outside the

home is in a sense a violation of privacy just as secret visual observation from a place outside the home (see *On Lee* v. *United States*, 343 U.S. 747, 754; *United States* v. *Lee*, 274 U.S. 559, 563) may be a violation of privacy. Neither, however, is the type of violation of privacy which is condemned by the Fourth Amendment because neither involves an entry of any kind. *On Lee* v. *United States*, 343 U.S. at 752-754. It is not wholly correct to say, as Mr. Justice Brandeis said in his dissent in *Olmstead*, that at the time of the framing of the Constitution, "Force and violence were then the only means known to man by which the Government could directly effect self-incrimination" (277 U.S. at 473). Eavesdropping and secret visual observation cannot have been unknown in law enforcement at the time the Constitution was adopted. Had the framers of the Constitution desired to create an absolute unlimited right of privacy and a "due process" that went to the extent of preventing all observations from outside by law enforcement officers, they could have stated that right explicitly, as they did the right against any unreasonable search of the "person", the "house" and the "papers, and effects". In what was expressed by the framers we can perceive what was excluded. The framers banned compulsion and physical taking—the compulsion by means of the hated general writs and warrants of that day, and the taking by physical entries into homes and searches and seizures of the person and property. But in the absence of entry and compulsion, with their particular type of offensiveness and invitation to violence, the framers left observation from without to the precautions and in-

genuity of those within[8] and to the more flexible and precise controls that the congress and state legislatures might employ.[9] Unreasonable compulsion and force were the targets of the writers of the Constitution. It is no answer to urge that other aspects of privacy are equally important and should also be protected. Whether they should or should not be, the Fourth Amendment does not reach them.[10] Congress can protect areas outside the scope of the Fourth Amendment, as it has done by Section 605 of the Communications Act. And, as we develop more fully, *infra*, we think that in this area which lies outside the scope of the Fourth Amendment, if control is to come, it must come from Congress.

C. *Since in this case the action of the officers was reasonable, the overheard conversations are not excludable under principles of due process.*

Petitioners argue that, even if there was no violation of the Fourth Amendment, the conversations overheard by the use of the amplifier should be deemed excludable as a violation of due process or in the exercise of the supervisory power of this Court. This argument for the most part is unrelated to the facts in this case. As discussed, *supra*, the police action here was, in its total

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[8] Such as, in this case, the hanging of a rug on the common wall between No. 408 and No. 406 (see fn. 7, *supra*).

[9] It should be recalled, in evaluating the dissents in *Olmstead*, *supra*, that the wire-tapping there involved had already been made an offense under the state statute.

[10] "It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by far-fetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties to an unreasonable search or seizure." *On Lee v. United States*, 343 U.S. at 754.

setting, reasonable. It was special and limited and not such as to shock the conscience of the scrupulous.

The reasonableness of what was done in this case is emphasized by contrasting it with the conduct in *Irvine v. California*, 347 U.S. 128, on which petitioners rely. There, officers had a key made to Irvine's home and bored a hole in the roof. They entered the home repeatedly to install a secret microphone and to move it about from time to time. The microphone remained constantly in use so that the officers for months could listen to all conversations in various rooms of the home, including the bedroom. Each of the entries was a trespass and probably a burglary for which an unofficial person would be severely punished.

Here, there was no trespass and no entry of any kind. There was merely the use of an existing crack in a party wall. The place, with good reason, was believed to be, not a home, but the office of an illegal gambling establishment. The microphone was not a permanent installation but was used from time to time during business hours. The amplification was not general but was limited to one officer using earphones. In no appropriate sense can the action here be compared with that in *Irvine*.

Petitioners conjure up various possibilities of what may develop in the future as to some other devices not used here. This *in terrorem* argument has no relevancy with respect to petitioners' argument that the evidence *in this case* should be excluded as obtained in violation of due process. Since there has been no invasion of rights of privacy guaranteed by the Fourth Amendment, the evidence would be excludable under the Fifth

Amendment only if, in the particular circumstances, the action of law enforcement officers was such as to offend civilized standards. This is made clear by *Rochin v. California*, 342 U.S. 165. Normally, the states may control the admission of evidence in their courts. But when, in a particular case, as in *Rochin*, specific police action is deemed to extend beyond acceptable standards, this Court has held that the use of such evidence is barred by concepts of due process. Necessarily, the application of this doctrine must depend on the actual facts of the case before the Court, and not upon the theoretical possibilities of what may occur in some other case. There is thus no occasion to invoke the Fifth Amendment in this case on the basis of what may occur in the future.

D. *There is no occasion for exercise of the supervisory power of this court to control evidence, for that power is normally exercised in implementation of a policy established by Congress and Congress has laid down no policy as to the device here in question.*

Petitioners ask this Court to exclude the evidence at issue here in the exercise of its supervisory power to control the reception of evidence in federal courts. Again, except for the unjustified characterization of the device here as turning a heating duct into a giant microphone, their argument rests mainly on the fear of potential developments in the field of electronics.

The fear of advances in technology was also in large part the basis of the dissent of Mr. Justice Brandeis in *Olmstead v. United States*, 277 U.S. at pp. 473-474

(Pet. Br. 14-15) on which petitioners rely. The fears expressed by Mr. Justice Brandeis more than 30 years ago have not, however, materialized. There is still no way "by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home" (*Id.*, 474). The "intimate occurrences" still can be photographed only, as 30 years ago, if an opening is left for the camera lens; otherwise there must be such breaking of a hole into the house through a wall, or such other entry, as would be violative of the Fourth Amendment today as it was at the time of *Olmstead*. So also, the possibility of using amplifying devices which do not require physical contact is still largely theoretical. At present, eavesdropping without trespass is feasible only in limited situations, such as that here.

In any event, and more basically, if future developments in the field of electronics are to be the subject of control, it is, we believe, for Congress to decide the nature of the controls. Congress did in fact legislate with respect to the particular aspect of eavesdropping with which *Olmstead* dealt—wire-tapping. As to electronic devices of the type here involved, however, Congress has not chosen to take any action, despite the period of almost twenty years that have elapsed since the decision of this Court in *Goldman* v. *United States*, 316 U.S. 129. The question of policy with respect to wire-tapping and controlling other forms of electronic devices is, as petitioners note, (Pet. Br. 22), a matter which has already received congressional attention. It

will undoubtedly receive more attention in the future. We think it is the task of Congress, not initially of the courts, to evolve a policy with respect to the use of electronic devices that do not themselves involve a violation of constitutional rights.

This Court has excluded evidence under its supervisory power only when such exclusion is in implementation of a policy which has theretofore been fixed by the Constitution or by Congress. See *On Lee* v. *United States*, 343 U.S. 747, 755. Thus after Congress, by the enactment of Section 605 of the Communications Act, laid down its policy against wire-tapping, this Court ruled in *Nardone* v. *United States*, 302 U.S. 379 and 308 U.S. 338, that evidence obtained by wire-tapping was inadmissible in federal courts. See also *Benanti* v. *United States*, 355 U.S. 96. Similarly, the decision of this Court in *McNabb* v. *United States*, 318 U.S. 332, outlawing confessions obtained during an unreasonable delay in arraignment, was in implementation of the congressional policy, now embodied in Rule 5, F.R. Crim. P., requiring prompt arraignment.

In this case, there is no equivalent constitutional or congressional policy which would justify the exclusion of the evidence. Indeed, to the extent that Congress has *not* legislated on the use of electronic devices which do not constitute an interception of a communication, whereas it *has* legislated on the subject of wire tapping, the congressional policy has given tacit approval to the rule laid down by this Court in *Goldman* v. *United States*, 316 U.S. 129, almost twenty years ago. The use of the amplifying device to over-

hear petitioners' conversations violated neither constitutional rights nor congressional policy. There is thus no occasion for the exercise of the supervisory power of this Court.

II

There Was no Trespass in This Case

Petitioners contend that, even if the rule of *Goldman v. United States*, 316 U.S. 129, is adhered to, the evidence in this case should be deemed excludable as obtained by trespass—and this without regard to whether the needle of the microphone extended further than one half of the party wall.[11] They argue that they were tenants in common of the whole party wall and that therefore any insertion into the party wall was a trespass onto their property. There is no merit in this contention, whatever view is taken of the rights in a party wall.

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[11] The party wall was 13 to 14 inches thick and the needle of the amplifying device, according to the testimony of the officers, penetrated only 5⅞ inches. It was thus at least half an inch short of petitioners' half of the wall (see the Statement, *supra*, pp. 5-6).

The testimony of the officers, who were actually at the scene in April 1958, was not overborne by the testimony of petitioners' witnesses who first examined the wall in March 1959. Petitioners' witnesses testified that the party wall was solid masonry except for a 9-inch wide area behind the heating duct for No. 408, where there was no masonry and concluded that the needle could have entered the wall only at some point along that 9-inch area (R. 210, 223). Since the back of the duct disclosed a small dent to two witnesses (R. 213, 223), two dents to another (R. 233), they inferred the needle must have reached this dent. The point of entry was assumed to be an oval indentation in the molding of No. 410, 18 inches from the front wall (R. 209), and on this basis the distance to the dent was stated at 7⅛ inches by two of petitioners' witnesses (R. 215, 235). A third who spoke generally of insertions

A. *Petitioners' title, under District of Columbia law, extended only to the midpoint of the wall and was not a tenancy in common of the entire wall.*

Since the officers did not themselves go into petitioners' room and since, moreover, the needle of their amplifying device, under any view of the facts, remained more than half a foot short of the room, petitioners seek to extend the boundary of what they claim as their "house" under the Fourth Amendment by asserting a tenancy in common of the entire party wall (Pet. Br. 25), so that a penetration of even the far side of the wall may be urged to be a "search" of their "house."

However, under the law of the District of Columbia, as under the preponderant weight of authority, the ownership of a party wall is in severalty, and extends only to the midpoint, with only reciprocal easements permitting the use of the wall by both parties.

The Court of Appeals of the District of Columbia stated in *Fowler* v. *Koehler*, 43 App. D.C. 349, 357:

> The erection of a party wall * * * amounts only to the establishment of a mutual easement or servitude and benefit. * * *. The erection of a party wall does not change the boundaries nor affect the title

behind the duct gave the distance as 6½ inches or 7 inches (R. 224). Since there was at least a 9-inch area along which the needle might have entered, even according to petitioners' witnesses, and since it was impossible to account for possible changes in the intervening eleven months, there would be no reason, on the basis of this speculative testimony, not to credit the testimony of the government witnesses that the needle did not extend more than half the distance of the party wall. The majority below stated that the record justified the conclusion that there was no physical trespass upon petitioners' half of the wall (R. 268).

> of the respective properties. While it stands, each party is permitted to use the wall. * * *.
>
> At common law it was defined as a wall of which two adjoining owners are tenants in common [citing English decisions]. In this country, many of the States have adopted the rule that the owners of a party wall erected in part upon the land of each are not tenants in common of the wall, but are owners in severalty of the part standing upon his land, subject to the easement of his neighbor for its support and the equal use thereof. * * * [citing state decisions].

As appears from its own citation of authorities, that decision was not based on an isolated or peculiar doctrine, but is in accord with the preponderant weight of authority.[12]

According to Tiffany (3 Tiffany, *Real Property* (3rd ed. 1939) 228), "In this country, no such presumption [tenancy in common] has ever been recognized, and a party wall almost invariably belongs to the fourth class mentioned above [separate ownership with easement for support], except in the few cases in which * * * built entirely on the land of one proprietor. * * *."

Professor Powell (5 Powell, *Real Property* (1956) 237-238), explaining the basic reasoning, observes that

[12] We do not understand upon what basis petitioners cite *Fowler* v. *Kochler* as supporting their theory that a party wall is held by tenancy in common in the District of Columbia (Pet. 12). Petitioners' additional citation, to the same effect, of the earlier case of *Moore* v. *Shoemaker*, 10 App. D.C. 6, apparently refers only to a dictum in that case, for the nature of the ownership was not in issue, the question being as to rights to support from a neighboring building whose wall never became a party wall. (10 App. D.C. at 14: "In this case the original division wall * * * was clearly not a party wall.").

the English courts prior to 1925 and American courts "in a few instances" had presumed the existence of a tenancy in common. He points out that the tenancy in common theory fails to serve the mutuality of benefit which is the basic justification for any party wall. As soon as the tenants in common have severed their common ownership by partition, one owner could pare away his half of the wall without liability for injuries thereby caused to his neighbor. The English Law of Property Act of 1925 directed that the presumption of cross-easements be made, and in the United States the cross-easement theory has found "wide acceptance" (*Id.* 238).

B. *The Use of a Party Wall is not Restricted so Long as There is no Interference with Support of the Building.*

It need scarcely be labored that it is no concern of the owner of half a party wall what the adjacent owner does with his other half so long as the structure is not weakened for the support of both the adjacent buildings. In common practice, persons drive nails into their side of the walls, decorate the walls as they see fit, and even cut bookcase alcoves, phonograph emplacements, or other indentations into their half of the wall. The decisions support a variety of uses. Thus, use of the wall for advertising purposes has been sustained. *Wilensky* v. *Robinson,* 203 Ga. 423, 429; *Lappan* v. *Glunz,* 140 Mich. 609; *Shiverick* v. *R. J. Gunning Co.,* 58 Neb. 297, reversed on other grounds 59 Neb. 73. One side of the wall may be built upon to raise that side higher than the adjoining building. *Andrae* v. *Haseltine,* 58 Wis. 395. As observed by

Tiffany (3 Tiffany, *supra*, 337), "It has been decided in one case that when a party wall is erected * * * one proprietor can extend his beams into the wall only so far as the limits of his own land, and there are occasional intimations to this effect in other cases. There cannot well be, however, any absolute rule to this effect. * * *."

Petitioners cite *Bartley* v. *Spaulding*, 21 D. C. 47, for its holding that windows were not permitted to be cut through a party wall (Pet. Br. 26). But in that case the windows were cut through the entire wall and a weakening of the wall was feared. The court held that the wall was to be restored not by a mere patch but as a continuous wall, as a patch would "not give the support to the wall that it should have as a party wall" (21 D.C. at 50). The same inapposite facts and considerations were involved in *Corcoran* v. *Nailor*, 17 D.C. 580, also cited by petitioners, holding that a wall which was permitted to be built in part on another's land, only for the purpose of serving as a party wall, could not contain 22 windows. And see the cases collected in 10 L.R.A.N.S. 1191-1194.

C. *Assuming arguendo a tenancy in common, the officers could not be considered trespassers in any part of the wall.*

If petitioners' theory of a tenancy in common in the party wall were accepted for the purpose of argument, petitioners could not gain thereby. For, as observed by the trial judge, both tenants of a tenancy in common are entitled to possession of every part of the affected property—"neither one is trespassing when he enters upon

the party wall, because a tenant in common can not, if I recall my Law of Real Property correctly, can not be guilty of trespass" (R. 41). Or, as stated by Professor Powell, "The characteristic attribute of a tenancy in common is unity of possession. This means that each of the coowners * * * shares with his cotenants one single right to possession, which right applies to every part of the affected property. * * *." 4 Powell, *Real Property* (1956) 595.

Thus, if there were a true tenancy in common, the officers would be free to use not alone their own half of the wall but rather the entirety of the wall so long as they did not block concurrent use by petitioners. A tenant in common is not a trespasser on any part of the estate.

III

There Was no Violation of the Communications Act

There is no merit to petitioners' argument that the Communications Act was violated because some of the words overheard from No. 408 were spoken into a telephone. *Goldman* v. *United States,* 316 U.S. 129, 133-134; *Irvine* v. *California,* 347 U.S. 128, 131; cf. *On Lee* v. *United States,* 343 U.S. 747, 754. The Communications Act protects only the means of telephonic communication—namely, the transmission of electrical impulses from the speaker to the recipient. What was picked up by the listening device were petitioners' spoken words carried by sound waves, not the electrical impulses carried by the telephone wires. Whether the words spoken were directed to a telephone receiver or to another person in the same room is irrelevant.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1960.

Julius Silverman, et al., Petitioners, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March 6, 1961.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioners were tried and found guilty in the District Court for the District of Columbia upon three counts of an indictment charging gambling offenses under the District of Columbia Code. At the trial police officers were permitted to describe incriminating conversations engaged in by the petitioners at their alleged gambling establishment, conversations which the officers had overheard by means of an electronic listening device. The convictions were affirmed by the Court of Appeals, 275 F. 2d 173, and we granted certiorari to consider the contention that the officers' testimony as to what they had heard through the electronic instrument should not have been admitted into evidence. 363 U. S. 801.

The record shows that in the spring of 1958 the District of Columbia police had reason to suspect that the premises at 408 21st Street, N. W., in Washington, were being used as the headquarters of a gambling operation. They gained permission from the owner of the vacant adjoining row house to use it as an observation post. From this vantage point for a period of at least three consecutive days in April 1958, the officers employed a so-called "spike mike" to listen to what was going on within the four walls of the house next door.

The instrument in question was a microphone with a spike about a foot long attached to it, together with an amplifier, a power pack, and earphones. The officers inserted the spike under a baseboard in a second-floor room of the vacant house and into a crevice extending several inches into the party wall, until the spike hit something solid, "that acted as a very good sounding board." The record clearly indicates that the spike made contact with a heating duct serving the house occupied by the petitioners, thus converting their entire heating system into a conductor of sound. Conversations taking place on both floors of the house were audible to the officers through the earphones, and their testimony regarding these conversations, admitted at the trial over timely objection, played a substantial part in the petitioners' convictions.[1]

Affirming the convictions, the Court of Appeals held that the trial court had not erred in admitting the officers' testimony. The court was of the view that the officers' use of the spike mike had violated neither the Communications Act of 1934, 47 U. S. C. § 605, cf. *Nardone* v. *United States*, 302 U. S. 379, nor the petitioners' rights under the Fourth Amendment, cf. *Weeks* v. *United States*, 232 U. S. 383.

In reaching these conclusions the court relied primarily upon our decisions in *Goldman* v. *United States*, 316 U. S. 129, and *On Lee* v. *United States*, 343 U. S. 747. Judge

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[1] Alleging that the conversations thus overheard had been the basis for a search warrant under which other incriminating evidence was discovered at 408 21st Street, N. W., the petitioners sought unsuccessfully to suppress the evidence obtained upon execution of the warrant. It is the Government's position that there were ample grounds to support the search warrant, even without what was overheard by means of the spike mike. We deal here only with the admissibility at the trial of the officers' testimony as to what they heard by means of the listening device, leaving a determination of the warrant's validity to abide the event of a new trial.

Washington dissented, believing that, even if the petitioners' Fourth Amendment rights had not been abridged, the officers' conduct had transgressed the standards of due process guaranteed by the Fifth Amendment. Cf. *Irvine v. California*, 347 U. S. 128.

As to the inapplicability of § 605 of the Communications Act of 1934, we agree with the Court of Appeals. That section provides that ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; . . . ." While it is true that much of what the officers heard consisted of the petitioners' share of telephone conversations, we cannot say that the officers intercepted these conversations within the meaning of the statute.

Similar contentions have been rejected here at least twice before. In *Irvine* v. *California*, 347 U. S. 128, 131, the Court said: "Here the apparatus of the officers was not in any way connected with the telephone facilities, there was no interference with the communications system, there was no interception of any message. All that was heard through the microphone was what an eavesdropper, hidden in the hall, the bedroom, or the closet, might have heard. We do not suppose it is illegal to testify to what another person is heard to say merely because he is saying it into a telephone." In *Goldman* v. *United States*, 316 U. S. 129, 134, it was said that "The listening in the next room to the words of [the petitioner] as he talked into the telephone receiver was no more the interception of a wire communication, within the meaning of the Act, than would have been the overhearing of the conversation by one sitting in the same room."

In presenting here the petitioner's Fourth Amendment claim, counsel has painted with a broad brush. We are asked to reconsider our decisions in *Goldman* v. *United*

States, *supra*, and *On Lee* v. *United States*, *supra*. We are told that re-examination of the rationale of those cases, and of *Olmstead* v. *United States*, 277 U. S. 438, from which they stemmed, is now essential in the light of recent and projected developments in the science of electronics. We are favoured with a description of "a device known as the parabolic microphone which can pick up a conversation three hundred yards away." We are told of a "still experimental technique whereby a room is flooded with a certain type of sonic wave," which, when perfected, "will make it possible to overhear everything said in a room without ever entering it or even going near it." We are informed of an instrument "which can pick up a conversation through an open office window on the opposite side of a busy street." [2]

The facts of the present case, however, do not require us to consider the large questions which have been argued. We need not here contemplate the Fourth Amendment implications of these and other frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society. Nor do the circumstances here make necessary a re-examination of the Court's previous decisions in this area. For a fair reading of the record in this case shows that the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners. As Judge Washington pointed out without contradiction in the Court of Appeals: "Every inference, and what little direct evidence there was, pointed to the fact that the spike made contact with the heating duct, as the police

[2] See Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 85th Cong., 2d Sess., on Wiretapping, Eavesdropping, and the Bill of Rights; Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 84th Cong., 1st Sess., on Wiretapping; Dash, Knowlton and Schwartz, The Eavesdroppers (Rutgers University Press, 1959), pp. 346–358.

admittedly hoped it would. Once the spike touched the heating duct, the duct became in effect a giant microphone, running through the entire house occupied by appellants." 275 F. 2d, at 179.

Eavesdropping accomplished by means of such a physical infrusion is beyond the pale of even those decisions in which a closely divided Court has held that eavesdropping accomplished by other electronic means did not amount to an invasion of Fourth Amendment rights. In *Goldman* v. *United States*, *supra*, the Court held that placing a detectaphone against an office wall in order to listen to conversations taking place in the office next door did not violate the Amendment. In *On Lee* v. *United States*, *supra*, a federal agent, who was acquainted with the petitioner, entered the petitioner's laundry and engaged him in an incriminating conversation. The agent had a microphone concealed upon his person. Another agent, stationed outside with a radio receiving set, was tuned in on the conversation, and at the petitioner's subsequent trial related what he had heard. These circumstances were held not to constitute a violation of the petitioner's Fourth Amendment rights.

But in both *Goldman* and *On Lee* the Court took pains explicitly to point out that the eavesdropping had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area. In *Goldman* there had in fact been a prior physical entry into the petitioner's office for the purpose of installing a different listening apparatus, which had turned out to be ineffective. The Court emphasized that this earlier physical trespass had been of no relevant assistance in the later use of the detectaphone in the adjoining office. 316 U. S., at 134–135. And in *On Lee*, as the Court said, ". . . no trespass was committed." The agent went into the petitioner's place of business "with the consent, if not by the implied invitation, of the petitioner." 343 U. S., at 751–752.

The absence of a physical invasion of the petitioner's premises was also a vital factor in the Court's decision in *Olmstead* v. *United States*, 277 U. S. 438. In holding that the wiretapping there did not violate the Fourth Amendment, the Court noted that "[t]he insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses." 277 U. S., at 457. "There was no entry of the houses or offices of the defendants." 277 U. S., at 464. Relying upon these circumstances, the Court reasoned that "[t]he intervening wires are not part of [the defendant's] house or office any more than are the highways along which they are stretched." 277 U. S., at 465.

Here, by contrast, the officers overheard the petitioners' conversations only by usurping part of the petitioners' house or office—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent. In these circumstances we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law. See *Jones* v. *United States*, 362 U. S. 257, 266; *On Lee* v. *United States*, *supra*, at 752; *Hester* v. *United States*, 265 U. S. 57; *United States* v. *Jeffers*, 342 U. S. 48, 51; *McDonald* v. *United States*, 335 U. S. 451, 454.

The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there

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See *Fowler* v. *Koehler*, 43 App. D. C. 349.

be free from unreasonable governmental intrusion. *Entick* v. *Carrington*, 19 Howell's State Trials 1029, 1066; *Boyd* v. *United States*, 116 U. S. 616, 626–630.[4] This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard.

A distinction between the detectaphone employed in *Goldman* and the spike mike utilized here seemed to the Court of Appeals too fine a one to draw. The court was "unwilling to believe that the respective rights are to be measured in fractions of inches." But decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area. What the Court said long ago bears repeating now: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely; by silent approaches and slight deviations from legal modes of procedure." *Boyd* v. *United States*, 116 U. S. 616, 635. We find no occasion to re-examine *Goldman* here, but we decline to go beyond it, by even a fraction of an inch.

Reversed.

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[4] William Pitt's eloquent description of this right has been often quoted. The Late Judge Jerome Frank made the point in more contemporary language: "A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle." *United States* v. *On Lee*, 193 F. 2d 306, 315–316 (dissenting opinion).

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1960.

Julius Silverman, et al., Petitioners, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March 6, 1961.]

Mr. Justice Douglas, concurring.

My trouble with *stare decisis* in this field is that it leads us to a matching of cases on irrelevant facts. An electronic device on the outside wall of a house is a permissible invasion of privacy according to *Goldman* v. *United States*, 316 U. S. 129, while an electronic device that penetrates the wall, as here, is not. Yet the invasion of privacy is as great in one case as in the other. The concept of "an unauthorized physical penetration into the premises," on which the present decision rests, seems to me to be beside the point. Was not the wrong in both cases done when the intimacies of the home were tapped, recorded, or revealed? The depth of the penetration of the electronic device—even the degree of its remoteness from the inside of the house—is not measure of the injury. There is in each such case a search that should be made, if at all, only on a warrant issued by a magistrate. I stated my views in *On Lee* v. *United States*, 343 U. S. 747, and adhere to them. Our concern should not be with the trivialities of the local law of trespass, as the opinion of the Court indicates. But neither should the command of the Fourth Amendment be limited by nice distinctions turning on the kind of electronic equipment employed. Rather our sole concern should be with

whether the privacy of the home was invaded. Since it was invaded here, and since no search warrant was obtained as required by the Fourth Amendment and Rule 41 of the Federal Rules of Criminal Procedure, I agree with the Court that the judgment of conviction must be set aside.

SUPREME COURT OF THE UNITED STATES

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[March 6, 1961.]

Mr. Justice Clark and Mr. Justice Whittaker, concurring.

In view of the determination by the majority that the unauthorized physical penetration into petitioners' premises constituted sufficient trespass to remove this case from the coverage of earlier decisions, we feel obliged to join in the Court's opinion.